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No. _____

Supreme Court, U.S.
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MICHAEL RODAK, JR.,[illegible]

In The
Supreme Court of The United States

OCTOBER TERM, 1973

73-170

CRENSHAW COUNTY PRIVATE SCHOOL FOUNDATION, a non-profit educational corporation organized under the laws of the State of Alabama, doing business as CRENSHAW CHRISTIAN ACADEMY,

Petitioner,

v.

JOHN B. CONNALLY, JR., Secretary of the Treasury of the United States, and JOHNNIE M. WALTERS, Commissioner of Internal Revenue

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner,

v.

JOHN B. CONNALLY, JR., Secretary of the Treasury of the United States, and JOHNNIE M. WALTERS, Commissioner of Internal Revenue

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Crenshaw County Private School Foundation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the proceedings on March 14, 1973.

OPINION BELOW

The Opinion of the Court of Appeals for the Fifth Circuit is reported at 474 F. 2d 1185, rehearing denied 475 F. 2d 1404, and is reproduced in Appendix A to this Petition.

The Opinion of the District Court for

the Middle District of Alabama, Northern Division, is reported at 343 F. Supp. 495 and is reproduced in Appendix B to this Petition.

JURISDICTION

The judgment of the Court of Appeals (Appendix A infra Page A-1) was entered on March 14, 1973. A timely Petition for Rehearing was denied on April 27, 1973 (Appendix A infra Page A-10). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

The questions presented for review are the following:

1. Whether the Federal District Court had jurisdiction to grant injunctive relief against the Internal Revenue Service restraining it from revoking tax exempt status and advance assurance of deductibility of contributions previously granted to Petitioner by the Service.

2. Whether this case involves a suit to restrain the assessment or collection of a tax so as to make applicable the provisions of the Anti-injunction Statute, 26 U.S.C. § 7421.

3. Whether the Anti-injunction Statute, 26 U.S.C. § 7421, or the Declaratory Judgment Act, 28 U.S.C. § 2201, deprives federal courts of jurisdiction to enjoin the Internal Revenue Service where it appears that substantial statutory and constitutional rights of the Petitioner are adversely affected by the threatened actions of the Service alleged to be illegal, such actions would result in irreparable injury to Peti-

tioner, and the Petitioner has no remedy at law.

4. Whether the Anti-injunction Statute, 26 U.S.C. § 7421, or the Declaratory Judgment Act, 28 U.S.C. § 2201, is unconstitutional as applied by the Court of Appeals for the Fifth Circuit in that it would not allow Petitioner to be heard by an impartial tribunal when it is threatened with irreparable injury by illegal administrative actions for which there is no remedy at law and thus violate due process rights guaranteed to the Petitioner by the Fifth Amendment.

5. Whether First Amendment and Fifth Amendment rights can be violated by administrative actions under the guise of the taxing power, when the Petitioner makes a showing that the threatened actions are unlawful and would produce irreparable injury.

6. Whether First Amendment and Fifth Amendment rights can be violated by administrative actions under an alleged justification that the taxing power is being thus applied so as to protect Fourteenth Amendment rights of other persons.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Constitutional Provisions Involved

The following federal constitutional provisions are involved in this suit:

> "Article I, Section 1. All legislative powers herein granted shall be vested in a Congress of the United States...."

"First Amendment to the United States Constitution. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

"Fifth Amendment to the Unites States Constitution. No person shall be... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

"Fourteenth Amendment to the United States Constitution, Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes Involved

The following federal statutes are involved in this suit:

Section 170 of the Internal Revenue Code, 26 U.S.C. § 170, provides in pertinent part as follows:

"(a) Allowance of deduction.--

(1) General rule.-- There shall be allowed as a deduction any charitable contribution (as defined in sub-section (c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary or his delegate.

* * *

(c) Charitable contribution defined.-- For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of--

* * *

(2) A corporation, trust, or community chest, fund, or foundation--

* * *

(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals;"

Section 501 of the Internal Revenue Code, 26 U.S.C. § 501, provides in pertinent part as follows:

"(a) Exemption from taxation. - An organization described in sub-section (c)...shall be exempt from taxation under this subtitle....

* * *

(c) List of exempt organizations.-- The following organizations are referred to in sub-section (a):

* * *

(3) Corporations, and any community chest, fund, or foundation,

> organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."

Section 7421 of the Internal Revenue Code, 26 U.S.C. § 7421 provides in pertinent part as follows:

> "(a) Tax.---...no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is a person against whom such tax was assessed."

The Federal Declaratory Judgment Act, 28 U.S.C. § 2201, provides in pertinent part as follows:

> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or

not further relief is or could be sought."

28 U.S.C. § 1331 provides as follows:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and cost, and arises under the Constitution, laws or treaties of the United States."

28 U.S.C. § 1340 provides in pertinent part as follows:

"The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue...."

28 U.S.C. § 1361 provides as follows:

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

Internal Revenue Regulation, Section 1.501 (c) (3) - 1, 26 C.F.R. 1.501 (c) (3), provides in pertinent part as follows:

"(d) Exempt purposes -- (1) In general. (i) An organization may be exempt as an organization defined in section 501 (c) (3) if it is organized and operated exclusively for one or more of the following purposes:

(a) Religious,...

* * *

(f) Educational,...

* * *

(3) Educational defined -- (i) In general. The term "educational" as used in section 501 (c) (3), relates to --

(a) The instruction or training of the individual for the purpose of improving or developing his capabilities; or

(b) The instruction of the public on subjects useful to the individual and beneficial to the community.

An organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion. On the other hand an organization is not educational if its principal function is the mere presentation of unsupported opinion.

(ii) Examples of educational organizations. The following are examples of organizations which, if they otherwise meet the requirements of this section, are educational:

Example (1). An organization, such as a primary or secondary school, a college, or a profes-

sional or trade school, which has a regularly scheduled curriculum, a regular faculty, and a regularly enrolled body of students in attendance at a place where the educational activities are regularly carried on."

STATEMENT OF THE CASE

The Petitioner was incorporated on July 15, 1965, as a non-profit religious educational corporation under the laws of Alabama, including the provisions of Title 10, Sections 124-132, Code of Alabama 1940, as amended. It began full operation as the Crenshaw Christian Academy on September 30, 1968, for students and parents who object to the constitutional inhibitions against prayer, Bible reading, religious study, and other activities of the Christian faith in public schools. The purpose of the Academy is to provide the children of the area an opportunity to obtain a quality education in a wholesome Christian atmosphere. The Academy is non-denominational and is open to all adherents of the Christian faith. Its membership and student admission policy has never included any reference to race or color, and there does not exist any officially recognized anti-racially discriminatory admission policy. It has never received an application from a non-white, and consequently has never denied an application for admission from a non-white.

On September 17, 1968, the Petitioner applied to the Internal Revenue Service for tax-exempt status under 26 U.S.C. § 501 (c) (3). On January 8, 1969, the

Service issued its determination letter and letter of advance assurance ruling that the Petitioner was exempt from federal income tax under that section of the Revenue Code and that donors could deduct contributions to the Petitioner as provided by 26 U.S.C. § 170.

The Petitioner has not changed its policies or practices in any material respect, and the applicable statutory law has remained unchanged.

On July 10, 1970, the Internal Revenue Service issued a news release wherein it was announced it could

> "no longer legally justify allowing tax-exempt status to private schools which practice racial discrimination nor can it treat gifts to such schools as charitable deductions for income tax purposes...where a school fails to establish that it has a racially non-discriminatory admission policy, an outstanding ruling of exemption will be withdrawn..."

On July 19, 1970, the Service amplified the release of July 10, 1970, by stating that its statement of position on racially non-discriminatory policies "would be applicable to all private schools, whether church related or not."

On June 18, 1971, the Internal Revenue Service wrote Petitioner requesting that it comply by establishing "a policy one way or the other," and by publicly advertising through the local news media a racially non-discriminatory policy.

Following further correspondence and conferences, Petitioner declined to accede to the request for compliance, and upon the threatened withdrawal of its tax-exempt status and advance assurance of deductibility of contributions, it instituted this action.

The United States District Court for the Middle District of Alabama, Northern Division, granted the Government's Motion to Dismiss (Appendix B, Page A-12) upon the grounds that 26 U.S.C. § 7421 deprived the court of authority to grant the injunctive relief sought and that Petitioner had an adequate remedy at law.

The Court of Appeals for the Fifth Circuit affirmed upon the first ground and pretermitted consideration of the second ground. A timely Petition for Rehearing in Banc was made on March 27, 1973, and denied by the court on April 27, 1973.

Jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331, 1340 and 1361, and under the inherent jurisdiction conferred by the Constitution of the United States.

ARGUMENT

Under the guise of the taxing power the Internal Revenue Service attempts to impose upon the Petitioner speech which Petitioner is unwilling to speak, to severely inhibit the free exercise and practice of religious beliefs prevalent among Petitioner's students and parents, to impinge upon Petitioner's assembly

and association, to deprive Petitioner of property in the form of necessary capital and operating funds, and to deny Petitioner its due process for the redress of these grievances.

These actions of the Service constitute serious violations of Petitioner's First Amendment and Fifth Amendment rights.

The irreparable injury caused by such conduct is both immediate and permanent. Suppression or compulsion of speech, interference with association, denial of due process, and restriction of religious liberty produce both instant and long-range harmful effects that cannot be evaluated in terms of dollars. But they import injuries of significant constitutional gravity. In a more pecuniary vein, and in the particular context of this case, the Petitioner is threatened with the loss of substantial sums of contributed capital. These funds, once lost, are forever lost. Revocation of advance assurance of deductibility of contributions by the Internal Revenue Service has a profound impact upon donors contemplating gifts.

Petitioner has no adequate remedy at law. The gravamen of Petitioner's complaint is that its First and Fifth Amendment rights are presently jeopardized and that it will suffer the loss of considerable contribution income -- not that it faces assessment or payment of tax. The normal methods of review for the purpose of challenging the assessment or collection of a tax are not open to Petitioner to prevent the loss of con-

tributed income or to ameliorate the intangible effects of First and Fifth Amendment invasions. These injuries require relief of an immediate injunctive nature. Otherwise, there is no remedy.

The Internal Revenue Service and the Courts below have said that there is no federal court jurisdiction to hear the grievances of Petitioner and fashion relief. They say that the Anti-injunction Statute, 26 U.S.C. § 7421, prohibits such jurisdiction because Petitioner's suit is "for the purpose of restraining the assessment or collection" of a tax.

The District Court conceded that collection of taxes was not a factor in the case (Appendix B, Page A-13).

Does this suit involve assessment of taxes? In the first place, as in Bob Jones University v. Connally et al, 341 F. Supp. 277 (1971), the primary purpose of the Service in threatening the revocation of the University's advance assurance "is not to assess and collect taxes, but to compel, through the use or threat to use, taxing powers to require private educational and religious institutions to comply with certain political or social guidelines with regard to the question of racial integration." So far as the Government is concerned, there is no regard for the increase of revenue in the instant situation. The Government's motive and purpose here is avowedly to implement an alleged federal policy which is totally irrelevant to revenue. The Government at no time has mentioned assessment to the Petitioner. So far as yet appears, no taxes are due. There

has been no return indicating tax liability, no audit, no investigation, no conference procedure, etc. Therefore, from the position of the Government there is no interest in this case genuinely connected with tax assessment.

In the second place, as previously mentioned, the Petitioner does not here seek to restrain the assessment of a tax. There has been no action of the Government to this date suggesting the assessment of a tax. What Petitioner is doing in this case is to prevent serious invasion of its First and Fifth Amendment rights and to prevent irreparable loss of contributed funds by unlawful agency action in revoking advance assurance of deductibility of contributions and thereby chilling philanthropy in its direction. This has nothing to do with assessment. From the standpoint of the Petitioner, assessment is not germane.

If the Government is not genuinely interested in assessment in this case, and neither is the Petitioner, then it is submitted as a reasonable conclusion that assessment is not an issue. So, § 7421 does not apply to deprive the court of jurisdiction.

It is clear that the "assessment" issue did not deprive the courts of federal jurisdiction in the cases of Green v. Connally, 330 F. Supp. 1150 (D. D.C. 1971), aff'd per curiam sub nom. Coit v. Green, 404 U.S. 997, 92 S. Ct. 564 (1971), McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972), Americans United Inc. v. Walters, (C.C.A., D.C.,

No. 71-1299, decided January 11, 1973), and Gladys McCoy v. Shultz, (D.D.C., No. 1580-72, decided February 13, 1973). The courts in those cases either stated ample reasons in upholding jurisdiction against arguments identical to those in the instant case, or else they believed the matter was too obvious to merit discussion. Those cases represent excellent authority for the contention of the Petitioner that § 7421 does not oust the federal court of jurisdiction in this case.

Even if it were assumed that "assessment or collection" is involved, the cases have recognized exceptions to the strict and literal proscription of the statute. In Miller v. Standard Nut Margarine Company, 284 U.S. 498, 52 S. Ct. 260, 76 L. Ed. 422 (1932), the Supreme Court stated:

> "And this court likewise recognizes the rule that, in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector. 248 U.S. p. 509."

It may be noted that in Nut Margarine an injunction was held properly granted where assessment was involved. However, the Fifth Circuit says that "(t)he Supreme Court has interpreted the provisions of Section 7421 (a) to mean that the tax assessment and collection pro-

cesses are not subject to injunctive interference unless the complainant shows (1) that 'it is clear that under no circumstances could the Government ultimately prevail,' and (2) that equity jurisdiction otherwise exists because of the absence of a legal remedy," citing Enochs v. Williams Packing Co., 370 U.S. 1, 82 S. Ct. 1125, 8 L. Ed. 2d 292 (1962). The Fifth Circuit aptly concludes, "Thus judged, the exceptions are seen to be quite narrow and complainant's burden a most onerous one indeed." In fact, whatever exceptions exist have been effectively legislated into oblivion by the strict construction placed upon them by the Courts below in this case. It is doubtful that any case can be imagined which could survive such scrutiny and satisfy the judicial mind "that under no circumstances could the Government ultimately prevail."

In dissent in Bob Jones in the Fourth Circuit on appeal (No. 72-1075, decided January 19, 1973) Senior Circuit Judge Boreman remarked:

> "The majority decision would permit the Government to irreparably damage the University by actions taken upon a legal determination by the Commissioner not directly related to any 'tax law,' for a purpose not directly related to the collection of any tax, upon the merest chance that the Commissioner might be right. On the facts of this case, I can find no reason, purpose or justification for permitting the Government, absent proper judicial scrutiny going substantially beyond the 'under no

circumstances' test of Williams Packing Co., to so proceed against the University. Surely such was not the intent of Congress in enacting § 7421, nor the meaning of the Supreme Court in Williams Packing Co.

Under the blanket protection of unfettered authority over the assessment and collection of taxes claimed and assumed by the Treasury officials, they are undertaking to interfere with and destroy the constitutionally mandated free and meaningful exercise and practice of the long established, widely publicized and unchallenged religious beliefs of Bob Jones University. To permit such threatened action in these circumstances without affording the University a right to judicial consideration would tend to demonstrate that the age old phrase - 'The power to tax is the power to destroy' - is literally true.

No case is cited by the Government which applies the strict Williams Packing Co. test in circumstances similar to those in the instant case. I reach the conclusion that the application of that test here may well present a question as to the constitutionality of § 7421."

It is submitted that either the Courts below have misapplied the Williams Packing Co. test or § 7421 as so applied is unconstitutional.

In any event, it is error to conclude that upon the showing made in this

case, Petitioner has not reasonably demonstrated that "under no circumstances could the Government ultimately prevail." Here are the circumstances:

1. Petitioner is an organization operated exclusively for religious, charitable, or educational purposes, as described in 26 U.S.C. § 501 (c) (3).

2. Petitioner was granted recognition of tax exempt status and advance assurance of deductibility of contributions by the Government on January 8, 1969, after due application and review.

3. Petitioner's tax exempt status and advance assurance have remained effective to this day but for the threatened actions of the Government.

4. Petitioner has in no material way changed any of its policies or manner of operation.

5. The pertinent statutory law has not changed.

6. The pertinent Internal Revenue Regulations have not changed.

7. The Petitioner is clearly entitled to tax exempt status and advance assurance under the provisions of the pertinent statutes and regulations.

8. The Government apparently justifies its threatened actions of revocation and suspension upon the authority of Green v. Connally, supra. Four elements are indispensable to support this theory in this case:

(a) Green v. Connally is generally valid authority for the claim that the Internal

Revenue Service cannot allow tax exempt status to private schools which practice racial discrimination nor can it treat gifts to such schools as charitable deductions for income tax purposes.

(b) Private religious schools are included within the scope of such authority.

(c) Crenshaw Christian Academy is guilty of practicing racial discrimination.

(d) Absence of conflicting First Amendment rights which would outweigh Fourteenth Amendment or other constitutional interests.

9. Crenshaw Christian Academy is a private religious school. See Walz v. Tax Commission of the City of New York, 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970).

10. The Academy has not been charged or found guilty of practicing racial discrimination. No pleading in this case suggests that the Academy practices racial discrimination.

11. No hearing has ever been afforded the Academy for the purpose of ascertaining whether racial discrimination has been practiced in actual fact.

12. The sole criteria honored by the Government for the purpose of ascertaining racial discrimination is a one-time written declaration of racially-nondiscriminatory policy to be advertised through one form of media one time.

13. The Academy merely refuses to make the required declaration.

It prefers to avow a neutral policy.

14. The Academy asserts basic First Amendment rights of religion, speech, assembly, and association and Fifth Amendment rights of property and due process which are threatened by the Government actions.

The sine qua non of the Government case is that racial discrimination exists, but the Government and the Courts below have only assumed such conduct on the part of Petitioner without ever charging or finding such to be the fact. This places the case squarely in the teeth of Speiser v. Randall, 357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958). The Government cannot be allowed to short-circuit due process in this fashion.

The Supreme Court in Norwood v. Harrison, No. 72-77, decided June 25, 1973, observed that "(p)rivate schools are not fungible and the fact that some or even most may practice discrimination does not warrant blanket condemnation." It further said, "No presumptions flow from mere allegations; no one can be required, consistent with due process, to prove the absence of violation of law."

If on a hearing before an impartial tribunal it is found that the Academy is discriminatory in the required sense, it would still be extremely questionable that conflicting interests asserted under Fourteenth Amendment or other constitutional provisions would justify suppression of First Amendment rights. The First Amendment is paramount. "Freedom

of press, freedom of speech, freedom of religion are in a preferred position." Murdock v. Pennsylvania, 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed. 1292 (1943); Follett v. Town of McCormick, 321 U.S. 573, 64 S. Ct. 717, 88 L. Ed. 938 (1944).

Finally, the decision of the Fifth Circuit in the instant case is directly in conflict with the decision of the Court of Appeals for the District of Columbia Circuit in Americans United v. Walters (Appendix C, infra). Petitioner understands that Petitions for Certiorari are now pending before the Supreme Court in Americans United and also Bob Jones University in which identical issues on the question of jurisdiction are presented.

CONCLUSION

For the reasons stated above, this Petition should be granted so that substantial questions relating to statutory and constitutional limitations upon the federal taxing power can be settled.

Respectfully submitted,

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-2775

CRENSHAW COUNTY PRIVATE SCHOOL FOUNDATION, Etc., d/b/a CRENSHAW CHRISTIAN ACADEMY,
Plaintiff-Appellant,

versus

JOHN B. CONNALLY, JR., Secretary of the Treasury of the U.S., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Alabama

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(March 14, 1973)

Before BELL and THORNBERRY, Circuit Judges and GROOMS, District Judge.

GROOMS, District Judge: This is an appeal by the plaintiff-appellant, a non-profit private school foundation, from an order of the District Court of the Middle District of Alabama, granting a motion to dismiss its

complaint for an injunction against the Secretary of the Treasury and the Commissioner of Internal Revenue.

The action was dismissed on two grounds. The lower court held that (1) relief was barred by 26 U.S.C.A. § 7421(a)[1], and (2) that plaintiff had an adequate remedy at law in view of the fact that it was not threatened with irreparable injury.

Since our decision is posited on the first ground, we pretermit a decision on the second.

Appellant was incorporated on July 15, 1965, as a non-profit religious educational corporation under the laws of Alabama, including the provisions of Title 10, §§ 124-132, Code of Alabama, 1940, as amended. It began full operation as the Crenshaw Christian Academy on September 30, 1968, allegedly "for students and parents who object to the constitutional inhibitions against prayer, Bible reading, religious study, and other activities of the Christian faith in public schools." Succinctly stated, the claimed purpose of the Academy is "to provide the children of the area an opportunity to obtain a quality education in a wholesome Christian atmosphere." Appellant avers that the Academy is non-denominational and is open to all adherents of the Christian faith, that its membership and student ad-

[1]Subject to exceptions not here applicable § 7421(a) provides that:
". . . [N]o suit for the purpose of restraining the assessment or collection of a tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."

mission policy has never included any reference to race or color, and that there does not exist any officially recognized anti-racially discriminatory admission policy. It concedes that it has never received an application from a non-white, and consequently has never denied an application for admission from a non-white.

On September 17, 1968, appellant applied to the Internal Revenue Service for tax-exempt status under Title 26, § 501(c)(3).[2] On January 8, 1969, the Service issued its determination letter and letter of advance assurance ruling that appellant was exempt from Federal income tax under that section of the Revenue Code and that donors could deduct contributions to appellant as provided by Section 170, Title 26 U.S.C.A.[3]

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[2]Section 501. EXEMPTION FROM TAX ON CORPORATIONS, CERTAIN TRUSTS, ETC.

(c) *List of exempt organizations.* — The following organizations are referred to in subsection (a):

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

[3]Section 170. CHARITABLE, ETC., CONTRIBUTIONS AND GIFTS

(a) Allowance of deduction. —

(1) General rule. — There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution

However, the letter contained conditions reading:

> "The conclusions in this ruling are based on the Service's understanding that the operations of your school do not involve state action constituting a violation of the Constitution or laws of the United States. Further, in the event of legislative developments, or judicial interpretations — constitutional or otherwise — respecting the legality or educational qualification of your purposes or manner of operation which affect your elegibility under section 501(c)(3) of the Code, this ruling shall cease to be of effect."

Following the three-judge decision in *Green* v. *Kennedy and Trower*, 309 F.Supp. 1127 (January 12, 1970), the Service issued a news release on July 10, 1970, wherein it was announced it could

> "no longer legally justify allowing tax-exempt status to private schools which practice racial

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shall be allowable as a deduction only if verified under regulations prescribed by the Secretary or his delegate.

. . .

(c) Charitable contribution defined. — For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of —

. . .

(2) A corporation, trust, or community chest, fund, or foundation —

(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals;

> discrimination nor can it treat gifts to such schools as charitable deductions for income tax purposes . . . where a school fails to establish that it has a racially non-discriminatory admission policy, an outstanding ruling of exemption will be withdrawn. . ."

On July 19, 1970, the Service amplified the release of July 10, 1970, by stating that its statement of position on racially non-discriminatory policies "would be applicable to all private schools, whether church related or not."

On June 18, 1971, the Internal Revenue Service wrote appellant requesting that it comply by establishing "a policy one way or the other," and by publicly advertising through the local news media a racially non-discriminatory policy.

Following further correspondence and conferences, appellant declined to accede to the request for compliance, and upon the threatened withdrawal of its tax-exempt status and advance assurance of deductibility of contributions, it instituted this action.

The Supreme Court has interpreted the provisions of Section 7421(a) to mean that the tax assessment and collection processes are not subject to injunctive interference unless the complainant shows (1) that "it is clear that under no circumstances could the Government ultimately prevail," and (2) that equity jurisdiction otherwise exists because of the absence of a legal remedy. *Enochs* v. *Williams Packing Co.*, 370 U.S. 1.

> "[T]he question of whether the Government has a chance of ultimately prevailing is to be determined on the basis of the information available to it at the time of suit. Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained." *Id.*

Thus judged, the exceptions are seen to be quite narrow and complainant's burden a most onerous one indeed.

Appellant insists that Section 7421(a) is inapplicable. Its insistence is premised on the position that the suit is not for the forbidden purpose proscribed by the section because (1) the administrative acts which it seeks to enjoin do not constitute an "assessment or collection" of a tax, and (2) because the purpose of the contested tax policy is not to raise revenue, but to compel compliance with the Government's policy respecting racial integration in the nation's schools. Initially it grounded its primary reliance upon the authority of *Bob Jones University* v. *Connally*, 341 F.Supp. 277 (1971). That decision was reversed by the Fourth Circuit on January 19, 1973, 41 U.S.L. Week 2393. While still insisting that the lower court was correct it now insists that the decision of the Circuit Court for the District of Columbia in *"Americans United" Inc.* v. *Walters*, (decided January 11, 1973) 41 U.S.L. Week 2392, should control. The court in the latter case, citing as sustaining authority the decision of the lower court in

Bob Jones, reached a conclusion contrary[4] to that of the Fourth Circuit on its review of the *Bob Jones* case.

Appellant to a lesser extent also relies on *Green* v. *Connally*, 330 F.Supp. 1150, *aff'd per curiam sub nom*, *Coit* v. *Green*, 404 U.S. 997. That was a class action by Negro federal taxpayers of Mississippi to enjoin U.S. Treasury officials from according tax-exempt status and deductibility of contributions to private schools which discriminated against Negros. That decision resolves the merits against appellant, but sustains the grant of an injunction without specific reference to Section 7421(a). In *Green* the court held that in light of the settled federal policy against racial discrimination the Internal Revenue Code must be construed to prohibit exemptions and deductions which extend tax benefits to racially discriminatory private schools. The court further held that the Internal Revenue Service can demand evidence of non-discrimination in admission policies in the nature of the evidence here requested before the institution of this suit.

We disagree with appellant's contention that Section 7421(a) is inapplicable because the suit did not seek to enjoin an "assessment or collection" of any tax.

The administrative proceedings were directed to a withdrawal of tax-exemption and deductibility-assur-

[4]The suit of the individuals involved dollars contributed by them to American United. The claim of the latter did not involve its own tax-exempt status but the deductibility of contributions to it. The court held that the suit could not be maintained by the former since "the relief sought by the individual appellants directly ranged within the ambit of § 7421(a)." American United was permitted to maintain its action.

ance rulings of the Internal Revenue Service. Those proceedings are directly involved with the assessment and collection of taxes from appellant and those making contributions to it. If those rulings are withdrawn, appellant will be liable for taxes on any net income realized by it and contributors to it will not be permitted to deduct from their gross income the amount of their contributions. Either event will result in an increase in taxes.[5] On the contrary, if the injunction issues, any assessment or collection of such increased taxes will be prohibited. Section 7421(a) is directed against that result.

We agree with the Fourth Circuit in *Bob Jones University* that the Government's policy with respect to racial discrimination is irrelevant to the proper disposition of this case.[6]

In view of the decisions in *Green* v. *Connally, aff'd sub nom Coit* v. *Green, supra,* and *Green* v. *Kennedy and Thrower, supra,* we cannot conclude that "under no circumstances" could the Internal Revenue Serv-

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[5]See Fourth Circuit opinion in *Bob Jones University.*

[6]See *Bailey* v. *George,* 259 U.S. 16 (1922), where the court upheld the application of the predecessor of Section 7421(a) and reversed the lower court which had granted an injunction against the Collector of Internal Revenue from collecting the Child Labor Tax in face of the argument that the tax was not for the purpose of raising revenue, but was penal and for the purpose of regulating child labor. See also, *Singleton v. Mathis,* 284 F.2d 616 (8 Cir.), where the court affirmed the denial of an injunction against the Director who was proceeding to collect a gaming tax of $250.00 each on pinball machines where it was obvious that the purpose of the tax was not to raise revenue but to control gambling.

ice prevail in withdrawing its tax-exemption and de-ductibility-assurance rulings.

Considering all the averments presented by the com-plaint, we do not consider the charge by way of con-clusion that the Internal Revenue Service is inter-fering with appellant's constitutional guarantee of re-ligious liberty sufficiently substantial to merit an adjudication with respect to that issue.

Congress has barred the side door to actions "with respect to Federal taxes" under the Declaratory Judg-ment Act, 28 U.S.C.A. § 2201, and, subject to the noted exceptions, has also barred the front by Section 7421(a). We are of the opinion and so hold that the lower court correctly ruled that Section 7421(a) constitutes a bar to the maintenance of this action. Consequently it did not err in dismissing the action on that ground. Its action is AFFIRMED.

A-10

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-2775

CRENSHAW COUNTY PRIVATE SCHOOL FOUNDATION, Etc., d/b/a CRENSHAW CHRISTIAN ACADEMY,

Plaintiff-Appellant,

versus

JOHN B. CONNALLY, JR., Secretary of the Treasury of the U.S., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Alabama

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion March 14, 1973, 5 Cir., 1973, ____ F.2d ____).

(April 27, 1973)

Before BELL and THORNBERRY, Circuit Judges and GROOMS, District Judge.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF ALABAMA, NORTHERN DIVISION

CIVIL ACTION NO. 3613-N

CRENSHAW COUNTY PRIVATE SCHOOL FOUNDATION, a non-profit educational corporation organized under the laws of the State of Alabama, doing business as CRENSHAW CHRISTIAN ACADEMY,

Plaintiff,

vs.

JOHN B. CONNALLY, JR., SECRETARY OF THE TREASURY OF THE UNITED STATES AND JOHNNIE M. WALTERS, COMMISSIONER OF INTERNAL REVENUE,

Defendants.

May 11, 1972

Before FRANK JOHNSON,
District Judge

This cause is now submitted upon defendants' motion to dismiss. The motion rests upon three grounds: (1) that this Court has no authority to grant the injunctive relief sought, (2) that plaintiff has an adequate remedy at law, and (3) that this is a suit against the government to which it has not consented.

The first point raised is premised upon 26 U.S.C. Sec. 7421(a) which provides:

> Tax.--Except as provided (in exceptional instances not relevant here) no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

Collection is not a factor in this case. Consequently, the applicability of Sec. 7421(a) depends solely upon whether the administrative process which plaintiff seeks to have enjoined constitutes assessment.

The defendants properly point out that actions necessary to an assessment are part of that process for the purposes of Sec. 7421(a). For example, in Campbell v. Guetersloh, 287 F.2d 878 (5th Cir. 1961), the Fifth Circuit said:

> Here the court has prevented the administrative investigation and determination necessary to the assessment of an additional tax, thus making impossible any legal determination by the Tax Court or the District Court whether available proof shows that a deficiency exists. All questions touching on the weakness of the Director's case and the difficulty of proof will be before the courts for their review once the administrative function is completed. That is when the court

> may first come upon the scene; not before the investigation has been completed. 287 F.2d at 881.

Thus, the cases have held that administrative determinations and investigations made prior to the individual assessment are beyond the injunctive reach of the courts until after a deficiency has been found. See Koin v. Coyle, 402 F.2d 468 (7th Cir. 1968); Wahpeton Professional Services P.C. v. Knisken, 275 F.Supp. 806 (D.N. Dak. 1967).

The only case which presents any difficulty for the defendants' position is Green v. Connally, 330 F.Supp. 1150 (D.D.C.), aff'd sub nom., Coit v. Green, 404 U.S. 997 (1971).1/ The defendants admit that, although "the government steadfastly maintained (that) the court was without jurisdiction," the court decided the case on its merits.

The Green case is the inverse of the present litigation. There the plaintiffs were black taxpayers and minor children who sought to force the Internal Revenue Service to terminate the tax benefits of private schools in Mississippi with racially discriminatory admissions policies. These were the same

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1/ Plaintiff also relies upon Bob Jones University v. Connally, No. 71-891 (D.S.C. Nov. 17, 1971) (appeal pending). As in the order previously entered in this case, denying a motion for a temporary restraining order, this Court will not follow that case.

benefits which plaintiff here seeks to retain. The plaintiffs in Green asked for a declaration that the granting of the tax exempt status and the advance assurance of deductibility to such schools is unconstitutional. The court not only agreed with plaintiffs but said:

> In the context of this case we cannot limit the protection of plaintiffs' rights to a mere declaration of the proper construction of the Internal Revenue Code. Taking into account the conditions in Mississippi which have already led to denial of plaintiffs' rights in the past, we conclude that protection to which they are entitled includes effective "directives and procedures satisfactory to this Court that the school (receiving tax exemption and deductibility) is not part of a system of private schools operated on a racially segregated basis."

In other words, the court found that an affirmative injunction was also necessary and appropriate.

Although the government contends that it maintained throughout that the court was without jurisdiction, the opinion does not mention the applicability of Sec. 7421(a). Assuming that the argument was thus presented to the court, it apparently warranted no discussion. Evidently the agency conduct in that case was well beyond the perimeter of assessment. Thus, the question is narrowed into whether the present litigation is

more analogous to Green or the cases upon which the defendants rely.

The defendants' cases can be categorized generally as concerned with the investigative and determinative phases of the assessment process. It is clear that an investigation is necessary before an assessment can be made. A determination that a particular situation exists is also crucial.

Green, on the other hand, involved a demand by plaintiffs that the Internal Revenue Service end certain exemptions for a class of institutions. The plaintiffs were not seeking to avoid their own tax liability but were motivated by a desire to vindicate basic civil rights. Plaintiffs sought to terminate the affirmative benefit to private, segregated schools. Thus, the question presented was a broad, constitutional challenge to administrative conduct and was brought in the form of a class action.

In the present case the defendants' effort to bring these affirmative benefits to an end is inextricably caught up in the administrative process of assessment of an individual taxpayer. Plaintiff is making a concerted effort to retain its own tax advantages. Yet the Supreme Court has said that "the manifest purpose of Sec. 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund." Enochs v. Williams Packing Co., 370 U.S.

1, 7 (1962). The more reasonable conclusion is that the administrative conduct here comes within the meaning of assessment in Sec. 7421(a).

Despite the apparently prohibitive language of Sec. 7421(a), there is a judicially created exception to the anti-injunction provision which will nevertheless permit a district court to act. In Enochs v. Williams Packing Co., 370 U.S. 1 (1962), the Supreme Court held that a district court was without authority to issue an injunction concerning an assessment unless it could be shown that (1) the taxpayer would suffer irreparable injury and is without legal remedy and (2) "if it is clear that under no circumstances could the Government ultimately prevail." 370 U.S. at 7.

Plaintiff here has suffered some injury as a result of the withdrawal of the advance assurance of deductibility. Yet in the Green opinion, which granted a preliminary injunction for the black taxpayers and school children, the court made these remarks:

> On the other hand, the United States Government, the schools which seek tax exempt status, and potential contributors will suffer no significant irreparable hardship if defendants are enjoined from issuing further rulings under Secs. 170(c) and 501(c).
>
> * * *
>
> Some contributors may be deterred by the doubt which this litigation casts on the deductibility of their contribution, but

> the schools are not entitled to have potential contributors kept ignorant of the fact that serious questions about the validity of these deductions have been raised. 309 F.Supp. at 1139.

Thus, whatever hardship the plaintiff is suffering or will suffer is not irreparable.

Additionally, the defendants' position in the case would seem destined to succeed on the merits. It cannot be said that "under no circumstances could the Government ultimately prevail." On the contrary, the affirmance of the Green case by the Supreme Court is persuasive authority that the withdrawal of tax exempt status to institutions such as plaintiff's is not only within the discretion of the Internal Revenue Service, but is constitutionally necessary. Accordingly, this litigation does not present a situation which would warrant the invocation of the judicial exception to Sec. 7421(a) and the motion to dismiss is due to be granted upon this ground.

As a second basis for the motion to dismiss, the defendants argue that plaintiff has an adequate remedy at law; thus, the equitable form of relief sought is inappropriate. The legal remedy is said to be that available to all taxpayers when a deficiency is determined to exist: that is, seek a refund after payment of the deficiency.

Necessary to this view is the assumption that plaintiff is suffering no

irreparable injury in having lost the advance assurance during the litigation. Inasmuch as this Court agrees with the conclusion reached in Green that such loss is not a significant, irreparable hardship, the defendants' argument rests on a firm foundation and the motion to dismiss will be granted on this ground as well.

Since plaintiff's action is due to be dismissed for the foregoing reasons, it is not necessary to discuss and decide the sovereign immunity ground for dismissal also advanced by defendants.

Accordingly, it is the ORDER, JUDGMENT and DECREE of this Court:

1. That defendants' motion to dismiss be and the same is hereby granted.
2. That the costs of this action be and the same are hereby taxed to the plaintiff for which execution may issue.

Appendix C

Notice: This opinion is subject to normal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

NO. 71-1299

"AMERICANS UNITED" INC., et al, *Appellants*

v.

JOHNNIE M. WALTERS, *Commissioner of Internal Revenue*

Appeal from the United States District Court
for the District of Columbia

Decided January 11, 1973

Mr. Alan Morrison, with whom *Mr. Franklin C. Salisbury* was on the brief, for appellants.

Mr. Leonard J. Henzke, Jr., Attorney, Tax Division, Department of Justice, with whom *Messrs. Thomas A. Flannery*, United States Attorney at the time the brief was filed, and *Grant W. Wiprud*, Attorney, Tax Division, Department of Justice, were on the brief, for appellee.

Before: Fahy, *Senior Circuit Judge*, Tamm and Wilkey, *Circuit Judges*.

Opinion by *Circuit Judge* Tamm.

Concurring Opinion by *Circuit Judge* Wilkey at p. 24.

Tamm, *Circuit Judge*: This case comes to us on appeal from an order in the district court denying appellants' (Plaintiffs below) petition to convene a three-judge district court pursuant to the provisions of 28 U.S.C. § 2282 (1970), and granting appellee's motion to dismiss. For the reasons stated at length below we affirm the action of the district court as it pertained to the individual appellants involved, but as to the corporate appellant reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND

Appellant Americans United, incorporated as "Protestants and Other Americans for Separation of Church and State," is organized under the laws of the District of Columbia and is a nonprofit educational corporation. On July 3, 1950, the Commissioner of Internal Revenue issued a ruling that Americans United qualified as tax exempt under § 101(6) of the Internal Revenue Code of 1939, the predecessor to § 501 (c)(3) of the 1954 Code.[1] Consequently, for a period of nearly twenty years not only was Americans United free from taxation upon its income, but also contributors to the corporation were entitled to the deductions provided under § 170 of the 1954 Code (§ 23(q) of the 1939 Code).[2] On April 25,

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[1]26 U.S.C. § 501(c)(3) (1970):

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

[2]Organizations which have secured rulings that they are tax exempt under § 501(c)(3) are described in I.R.S. Publication No.

1969, a letter ruling from the Service revoked the 1950 ruling, holding that Americans United had violated §§ 170(c)(2)(D) and 501(c)(3) of the Code by devoting a substantial part of its activities to attempts to influence legislation. More particularly, the letter ruling stated that although part of Americans United's activities could be classified as "educational" or "charitable" within the meaning of § 501(c)(3) of the Code, it was, nonetheless, an "active advocate of a political doctrine." The majority of the corporation's activities were held to be in furtherance of the following goals: "the mobilization of public opinion; resisting every attempt by law or the administration of law which widens the breach in the wall of separation of church and state; working for the repeal of any existing state law which sanctions the granting of public aid to church schools; and uniting all 'patriotic' citizens in a concerted effort to prevent the passage of any federal law allotting, directly or indirectly, federal education funds to church schools."

While Americans United still retained a tax exempt status as an organization described in § 501(c)(4) of the Code,[3] the removal of its § 501(c)(3) exemption allegedly proved to be most damaging. Americans United states that its resulting removal from the list of § 170 corporations to whom tax free contributions could be made dried up its well of contributory resources to such an extent that it operated at a deficit for the

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78, *Cumulative List, Organizations Described in Section* 170(c) *of the Internal Revenue Code of* 1954. The requirements for §§ 501(c)(3) and 170(c)(2) are nearly identical in every respect.

[3] 26 U.S.C. § 501(c)(4) (1970):

> Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

first time in its history during fiscal year 1970. Consequently, on July 30, 1970, this action was commenced in the United States District Court for the District of Columbia. Two individual plaintiffs, Archer and Lowell, apparently suing as taxpayers who intended in the future to contribute to Americans United, joined with Americans United in bringing the class action.

The amended complaint in the district court averred violations of various first and fifth amendment liberties and guarantees: (1) §§ 170 and 501, and the action of the Commissioner in giving force and effect thereto, were unconstitutional and void insofar as they denied § 501(c)(3) status to the corporate appellant by reason of its exercise of first amendment rights, and likewise denied individual appellants the privilege of deducting the contributions used as a vehicle to exercise their first amendment rights. (2) Since what was a "substantial part" in the case of Americans United was not a "substantial part" in the case of other, larger organizations opposed to appellants' viewpoint, the change of status because of the substantiality of the activities of one organization as opposed to another in expressing opinions and influencing legislation was an unreasonable classification against Americans United, and by reason thereof Americans United and other organizations similarly situated were being discriminated against and denied equal protection of the laws in violation of the fifth amendment of the United States Constitution. (3) Appellants claimed that their tax dollars were being used by reason of §§ 170 and 501 in a manner that aided and strengthened churches whose size permitted their influencing of legislation to be "relatively less substantial than that of the corporate [appellant]," and that appellee's actions in enforcement thereof constituted violations of the establishment and free exercise clauses of the first amendment. (4) The exemption clause of § 501(c)(3) amounted to an invalid delegation of legislative power "in that the statutory standards of 'substantiality' and 'propaganda' [were] lacking in specificity for the carrying out of the purpose of Section 501(c)(3)." (5)

Finally, the defendant acted arbitrarily and capriciously in abuse of his discretion in applying, in this situation, the "substantial influencing" clause of the statutory exemption of § 501(c)(3).

Appellants' complaint founded jurisdiction for the action upon 28 U.S.C. § 1331 (1970) (civil action where amount in controversy exceeds $10,000 and which arises under the Constitution and laws of the United States), 28 U.S.C. § 1340 (1970) (whereby jurisdiction is bestowed in the federal district court in any civil action arising under an Act of Congress providing for internal revenue), and § 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1970) (making final agency action subject to judicial review). Appellants also sought the convention of a three-judge district court pursuant to 28 U.S.C. §§ 2282[4] and 2284 (1970), and requested the following relief: (1) Declaratory judgment that the "exemption clauses of Section 501(c)(3) [were] separable from the remainder of the section and [were] null and void" as unconstitutional under the first and fifth amendments, and as an invalid delegation of legislative power.[5] (2) Judgment "re-

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[4]28 U.S.C. § 2282 (1970):

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

[5]In this manner the appellants seek to continue the viability of § 501(c)(3) without the challenged "substantial part" exception to the exemption. As the Court of Appeals for the Tenth Circuit has recently stated: "Where a court is compelled to hold such a statutory discrimination invalid, it may consider whether to treat the provisions containing the discriminatory underinclusion as generally invalid, or whether to extend the coverage of the statute." Moritz v. Commissioner, No. 71-1127 (November 27, 1972), at p. 8. *Cf.* Welsh v. United States, 398 U.S. 333, 361 (1970) (Harlan, J., concurring), and Skinner v. Oklahoma, 316 U.S. 535, 542-43 (1942).

quiring" the appellee to "reevaluate" corporate appellant as a § 501(c)(3) charitable corporation and to reinstate corporate appellant on the *Cumulative List, Organizations Described in Section* 170(c) *of the Internal Revenue Code of* 1954, if found to be eligible under the newly constituted § 501(c)(3). (3) Judgment restraining the appellee from enforcing §§ 170 (c) and 501(c)(3) so as to deprive the individual appellants "of the benefit of tax advantages in the exercise of their First Amendment rights by reason of the unconstitutionality of those sections." (4) Judgment that appellee acted in an arbitrary and capricious manner in changing the status of corporate appellant. (5) In the alternative, judgment requiring appellee to reopen the revocation proceedings and reevaluate the corporate appellant "in the light of the final decision in this case."

Appellee filed a motion to dismiss, based essentially on 28 U.S.C. § 2201 (1970),[6] which prohibits declaratory judgments "with respect to Federal taxes," and 26 U.S.C. § 7421 (a) (1970),[7] which prohibits suits "for the purpose of restraining the assessments or collection of any tax." The trial court denied appellants' petition to convene a three-judge court, finding that no substantial constitutional question was raised,

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[6] 28 U.S.C. § 2201 (1970):

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

[7] 26 U.S.C. § 7421(a) (1970):

Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b) (1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

The exceptions provided are not applicable to this case.

and granted appellee's motion to dismiss, citing *National Council on the Facts of Overpopulation v. Caplin*, 224 F.Supp. 313 (D.D.C. 1963).

Alleging error in both aspects of the trial court's order, appellants bring this appeal. Contending that no taxes have been assessed or collected, that this is a civil rights rather than tax case, and that they have no other adequate remedy, appellants maintain that the provisions of 26 U.S.C. § 7421(a) (1970) and 28 U.S.C. § 2201 (1970) cannot be used to prohibit the declaratory and injunctive relief sought. They further contend that they have raised substantial constitutional questions meriting the invoking of a three-judge court under the standards established in *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962). Appellee's posture on appeal is somewhat different, of course, and in addition to the grounds listed by the trial judge for dismissing the action he relies upon the doctrine of governmental immunity, claiming this to be an unconsented suit against the United States. *Louisiana v. McAdoo*, 234 U.S. 627 (1914).

II. JURISDICTION

1. *Introduction*

The statutes providing for three-judge "constitutional" courts, adopted to avoid impolitic action on the part of lone federal district judges in matters of broad regulatory scope, are procedural rather than substantively jurisdictional in nature. A complaint which raises substanial constitutional questions and otherwise meets the requirements of § 2282 can and should be dismissed if independent district court jurisdiction is found wanting. "[T]he provision requiring the presence of a court of three judges necessarily assumes that the District court has jurisdiction." *Ex Parte Poresky*, 290 U.S. 30, 31 (1933). This court has held that a dismissal for want of jurisdiction is properly a matter for a single district judge without considering the question of convening a three-judge court. *Eastern States Petroleum Corp. v. Rogers*, 280 F.2d 611 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 891 (1960). *Accord, Nation-*

al Council on the facts of Overpopulation v. Caplin, 224 F. Supp. 313 (D.D.C. 1963). The first order of business for the single district judge is simply put (although, as here, not so simply decided): Does the district court have jurisdiction even to consider the applicability of a three-judge panel, or are the plaintiffs out of court for lack of subject matter jurisdiction?

The anti-injunction statute (26 U.S.C. § 7421 (1970)) by its terms denies jurisdiction to "any court" in actions seeking to enjoin the assessment or collection of taxes. If such a statute is applicable here the appellants cannot be afforded the relief requested, regardless of the substantiality of the constitutional questions raised. *See, e. g., Harvey v. Early*, 160 F.2d 836 (4th Cir. 1947).

Although its legislative history may be "shrouded in darkness,"[8] the *raison d'etre* of § 7421(a) was illuminated by Chief Justice Warren in *Enochs v. Williams Packing & Navigation Co., Inc.*, 370 U.S. 1, 7 (1962):

> The manifest purpose of § 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. *In this manner the United States is assured of prompt collection of its lawful revenue.* (Emphasis added, footnote omitted.)

See also State Railroad Tax Cases, 92 U.S. 575, 613-14 (1875). Section 7421(a) was thus born of administrative and governmental necessity, used to prevent intermeddling in the tax collection process. An offspring of the equity rule that a suit to enjoin the collection of taxes was not maintainable unless an adequate remedy at law was lacking, its language is much stronger and more encompassing in scope. Even if it can be shown that irreparable injury will result if the collection is

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[8] *See* Note, *Enjoining the Assessment and Collection of Federal Taxes Despite Statutory Prohibition*, 49 Harv. L. Rev. 109 (1935).

effected, § 7421(a) bars a suit for an injunction in the absence of very special circumstances. *See Enochs, supra,* 370 U.S. at 6.

The history of the Declaratory Judgments Act and § 2201 is somewhat different. When initially promulgated in 1934,[9] the phrase "except with respect to federal taxes" was absent from § 2201. Consequently, federal taxpayers (innovative as they are) quickly utilized it to obtain declaratory judgments holding various tax statutes unconstitutional, something they were barred from accomplishing under the anti-injunction statute.[10] Congress (innovative as it is) quickly reacted and amended § 2201 to include the contentious phrase.[11] The Senate Finance Committee, in reporting out the amended version, stated that the "application of the Declaratory Judgments Act to taxes would constitute a radical departure from the long-continued policy of Congress [as represented today by §7421(a)] with respect to the determination, assessment, and collection of Federal taxes."[12] Literally broader than § 7421(a) in its preclusion of tax oriented remedies, the § 2201 exception has literarily been found coterminus with that provided by § 7421(a). *McGlotten v. Connally,* 338 F.Supp. 448 (D.D.C. 1972). *See also Bullock v. Latham,* 306 F.2d 45 (2d

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[9]Act of June 14, 1934, ch. 512, 48 Stat. 955.

[10]*See, e.g.,* Penn v. Glenn, 10 F.Supp. 483 (W.D. Ky. 1935), *app. dismissed per curiam,* 84 F.2d 1001 (6th Cir. 1936), and F.G. Vogt & Sons, Inc. v. Rothensies, 11 F.Supp. 225 (E.D. Pa. 1935). Although both courts refused to grant injunctive relief, they expected the tax collector to "respect the decision." If he did not do so and the taxpayer was forced to sue for a refund, "the trial court would probably be justified in refusing him a certificate of probable cause, and thus he and his bond would be liable for the judgment obtained." 11 F.Supp. at 231. This was a neat circumvention of the anti-injunction statute, but one that Congress did not appreciate.

[11]Act of August 30, 1935, ch. 829, § 405, 49 Stat. 1027.

[12]S. Rep. No. 1240, 74th Cong., 1st Sess. 11 (1935).

Cir. 1962), and *Tomlinson v. Smith*, 128 F.2d 808 (7th. Cir 1942). We believe that to be a correct interpretation, one soundly based on the history of the exception and on the paradoxicalness of authorizing injunctive relief while depriving courts the authority to declare the rights of the parties in connection with the injunctive relief. The breadth of the tax exception of § 2201 is co-extensive with the effect of § 7421 (a), and so the applicability of the latter to our situation is determinative of jurisdiction.

2. *Individual Appellants*

The springboard of the action before us—namely that the removal of Americans United from the status of those corporations to whom tax deductible contributions can be made has wreaked havoc upon its financial stature—is the same for both the individual and corporate appellants. They seek to keep Americans United afloat. However, the posture of the appellants and the effect that the relief sought would have upon them is distinctively different. Stripped to its barest essentials, the individual appellants' relief relates directly to the assessment and collection of taxes. They seek, despite their averments that no taxes have been assessed and that this is a civil rights rather than tax case, to enjoin the appellee from assessing or collecting taxes on those dollars contributed by them to Americans United. In paragraph 3 of the relief portion of appellants' amended complaint this becomes evident:

> [Plaintiffs pray that the following relief be granted:] Judgment enjoining defendant Thrower from enforcing Sections 170(c) and 501(c)(3) of Title 26 U.S.C.A., so as to deprive the individual plaintiffs and others similarly situated of the benefit of tax advantages in the exercise of their First Amedment rights by reason of the unconstitutionality of those sections.

The allegations that the tax will be assessed and collected in violation of their constitutional rights is to no avail. *See Dodge v. Osborn*, 240 U.S. 118 (1916); *Harvey v. Early*, 160

F.2d 836 (4th Cir. 1947); *Moon v. Freeman*, 245 F. Supp. 837 (E.D. Wash. 1965); *National Council on the Facts of Overpopulation v. Caplin*, 224 F.Supp. 313 (D.D.C. 1963). The allegation that no tax has yet been assessed, and that therefore the action is somehow without § 7421(a), we find to be equally without merit. In the words of Chief Judge Sirica in *National Council, supra*, 224 F.Supp. at 314, "[t]he Court cannot agree that the immunity of a tax assessment from court-imposed restraint has anything to do with the timing of that restraint." Finally, the individual appellants have not shown the high probability of success on the merits that warrants the non-application of § 7421(a) under the standards enunciated in *Enochs v. Williams Packing & Navigation Co., Inc.*, 370 U.S. 1, 7 (1962):

> [I]f it is clear that under no circumstances could the Government ultimately prevail, the central purpose of the Act is inapplicable and, under the *Nut Margarine* case [*Miller v. Standard Nut Margarine Co.*, 284 U.S. 498 (1932)], the attempted collection may be enjoined if equity jurisdiction otherwise exists. In such a situation the exaction is merely in "the guise of a tax." *Id.*, at 509.
>
> We believe that the question of whether the Government has a chance of ultimately prevailing is to be determined on the basis of the information available to it at the time of suit. Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim may the suit for an injunction be maintained.

The action brought and the relief sought by the individual appellants directly ranges within the ambit of § 7421(a), and as to them the action of the district court in dismissing the case was correct.

3. *Corporate Appellant*

Americans United, at the present time exempt from taxation on income by virtue of 26 U.S.C. § 501(c)(4) (1970),

does not seek in this lawsuit to enjoin the assessment or collection of its own taxes. Because of the "tax breaks" attendant to contributions to corporations qualifying under § 170(c) of the Code, qualification thereunder is a precious possession and removal from the *Cumulative List, Organizations Described in Section 170(c) of the Internal Revenue Code of* 1954 is a damaging—sometimes fatal—injury to the financial status of any "charitable" organization. Potential contributors with a minimum of business acumen are careful to get the most for their contributed dollar, and one certain way not to do so is to contribute to non-§ 170 corporations. Appellant, therefore, presented with the dollar dilemma of finding prospective contributors closing their wallets, seeks to have the court restrain the Commissioner from meting § 501(c)(3) and § 170(c) qualifications in the alleged unconstitutional manner. A necessary side effect of any relief, of course, will be to allow contributions which otherwise would be made with after tax dollars to become deductible. Consequently, the appellee alleges that this is in essence a suit to restrain the assessment or collection of a tax and barred by § 7421(a).

McGlotten v. Connally, 338 F.Supp. 448 (D.D.C. 1972), involved a class action brought by a black American denied membership in an Elks Lodge because of his race. The plaintiff sought to enjoin the Secretary of Treasury from granting tax benefits to fraternal and nonprofit organizations which excluded nonwhites from membership. The statutes involved were similar to those in the case before us, granting various exemptions both to the organizations and their contributors. The plaintiff alleged that the statutes were either unconstitutional, unconstitutionally interpreted, or that the benefits granted thereby were in violation of Title VI of the Civil Rights Act of 1964. The defendant moved to dismiss citing §§ 2201 and 7421(a), but a three-judge district court denied the motion. Chief Judge Bazelon, writing for the court stated:

> Plaintiff's action has nothing to do with the collection or assessment of taxes. He does not contest the amount

of his own tax, nor does he seek to limit the amount of tax revenue collectible by the United States. The preferred course of raising his objections in a suit for refund is not available. In this situation we cannot read the statute to bar the present suit. To hold otherwise would require the kind of ritualistic construction which the Supreme Court has repeatedly rejected. Even where the particular plaintiff objects to his own taxes, the Court has recognized that the literal terms of the statute do not apply when "the central purpose of the Act is inapplicable." In the present case, the central purpose is clearly inapplicable. It follows that neither § 7421(a) nor the exception to the Declaratory Judgment Act prohibits his suit.

Id. at 453-54 (footnotes omitted).

A case from the opposite side of the restraint coin, wherein the Commissioner threatened to remove the tax exempt status of an organization because of racially discriminatory policies, is *Bob Jones University v. Connally*, 341 F.Supp. 277 (D.S.C. 1971). Fearing that a drop in its level of contributions would cause irreparable harm, the University sought a preliminary injunction restraining the Commissioner from removing its § 501(c)(3) qualification. Faced with identical §§ 2201 and 7421(a) arguments, the district judge granted the injunction. The court found that the gravamen of the plaintiff's complaint was not to ask the court to substitute its views for that of the Commissioner, *see Jolles Foundation, Inc. v. Moysey*, 250 F.2d 166 (2d Cir. 1957), but rather to prevent the Commissioner from acting "beyond the authority granted by the constitution or by the Congress, and to read into the Internal Revenue Laws powers that are not expressly given and that were never intended by Congress." 341 F.Supp. at 282-83. The court went on to state:

If there were no contest as to the legality or the power of the defendants to revoke under existing law plaintiff's tax exempt status because of its admitted racial discriminatory admissions policy, but was instead a case involving the ap-

> plicability of such a rule to the plaintiff, it would then appear to be a case where this court was asked to preempt discretionary power of a federal office which it would be powerless to do . . . . Plaintiff is not challenging the applicability of the rule, but the legality of the rule itself.
>
> Bob Jones University is not seeking a declaratory judgment, but rather seeks to enjoin the defendants from exercising alleged illegal and *ultra vires* power and authority. Consequently, it is concluded that the levy, assessment, and collection of a tax is not the main issue. Plaintiff does not contest the amount or method of any levy, assessment, or collection, or evidence to be used in making such determination of taxes that might become due. Plaintiff is seeking to enjoin what it contends to be illegal and unconstitutional actions or threatened actions on the part of officials of the United States Government which it claims would lead to irreparable harm . . . .

Id. at 283.

Here, as in *Bob Jones*, the essence of appellants' attack is not against the applicability of a test or their ability to qualify under presently existing standards. As the appellee correctly points out in his brief, "[appellants] do not seriously contend that Americans United qualifies under Section 501(c) (3) as written. Rather, they contend that the clause disqualifying organizations which devote a substantial part of their activities to political propaganda and lobbying should be elided as unconstitutional, and they seek a declaratory judgment to that effect."

Appellee principally relies upon *Jolles Foundations, Inc. v. Moysey, supra.* Although there is language in *Jolles* regarding § 2201 we believe it to be distinguishable and not persuasive. In *Jolles* the appellant alleged that the Commissioner erred in his determination of its tax exempt qualification, and brought an action which the court correctly viewed as in the nature of mandamus "against the Commissioner to compel him to reverse his position based upon the activities of the Foundation

already held not to come within the exception . . . ." 250 F.2d at 169. We submit that the *Jolles* case did not involve the alleged unconstitutionality of a taxing statute, but a challenge respecting the judgment of the Commissioner, and manifestly "the court cannot presume to speak for the Commissioner or take over his duty to pass upon the tax status of organizations applying for exemption." *Id.*

Here, as in *McGlotten* and *Bob Jones*, no tax has been or will be assessed against the corporate appellant. The restraint upon assessment and collection is at best a collateral effect of the action, the primary design not being to remove the burden of taxation from those presently contributing but rather to avoid the disposition of contributed funds away from the corporation. The corporation, alleging constitutional violations of an identical nature to that of the individual appellants, irreparable injury, and an inadequate legal remedy,[18] does so in a posture removed from a restraint on assessment or collection. We find, as did the courts in *Bob Jones, McGlotten*, and im-

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[18]Since Americans United qualifies as a tax exempt organization pursuant to §501(c)(4) of the Code, the normal avenue of challenge, tax refund litigation, is not available. Appellee in his Supplemental Memorandum and at oral presentation for the first time suggested two additional "adequate" legal remedies available to the appellant corporation. These are the federal social security and unemployment tax refund litigations, since § 501(c)(3) organizations are exempt from both taxes while § 501 (c)(4) organizations are exempt from neither.

Appellant points out that although not required to pay social security taxes while exempt under § 501(c)(3), it elected to do so. A termination of such an election requires two years advance notice and cannot be made if the election has been in effect more than eight years, as it was here. Moreover, under 26 U.S.C. § 3121(k)(3) (1970), an organization which once terminates its election to pay those taxes voluntarily cannot renew the election. Although the unemployment tax refund litigation is not fraught with perils of equal magnitude, it is subject to certain conditions and, we feel, is so far removed from the mainstream of the action, and relief sought as to hardly be considered adequate.

pliedly the court in *Green v. Kennedy*, 309 F.Supp. 1127 (D.D.C. 1970), on permanent injunction, 330 F.Supp. 1150 (D.D.C. 1971), *aff'd per curiam*, 404 U.S. 997 (1971),[14] that it would be an all too encompassing interpretation of § 7421(a) to consider it as precluding a suit of this nature, and refuse to so hold.[15]

We do not adopt the doctrine that § 7421(a) is inapplicable so long as a party does not seek to restrain the collection or

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[14]*Green* involved a class action brought by black students and their parents to enjoin the Secretary of Treasury from granting tax exempt status to private schools discriminating against blacks. A three-judge district court was convened and, Judge Leventhal writing, determined that the Internal Revenue Code could not be interpreted as granting a tax exempt status to such organizations. Although faced with governmental insistence that the relief sought was barred by §§ 2201 and 7421(a), the court did not address the problem but granted the injunctive relief. The case was affirmed *per curiam* and without opinion by the Supreme Court, but as by that time the Commissioner had "voluntarily" altered the rules to comply with the decision, and the government did not press the appeal, the precise force and effect of the affirmance is questionable.

[15]The ultimate effect of the *Green* and *McGlotten* litigations was to increase the tax revenue of the United States, while at least theoretically the effect of *Bob Jones* and the case at hand is to decrease the tax revenue. We do not believe, and appellee has in fact agreed, that such a fact is of distinguishable merit. It is untenable that a party seeking to have an entire section declared unconstitutional, thus removing the exemption and theoretically increasing the tax revenue, should be treated differently from one seeking to remedy the discriminatory underinclusion by striking the unconstitutional clause, and thus theoretically decreasing the tax revenue.

In reaching our conclusion regarding the applicability of § 7421(a) we have considered, and found unpersuasive, the decisions in Liberty Amendment Committee of the U.S.A. v. United States, Civ. No. 70-721-HP (C.D. Cal June 19, 1970), *aff'd per curiam*, No. 26,507 (9th Cir. July 7, 1972), and Crenshaw County Private School Foundation v. Connally, 343 F.Supp. 495 (M.D. Ala. 1972).

assessment of its own taxes. Our holding is much narrower. In those situations where a non-taxpayer sues in the stead of the taxpayer,[16] *e.g.*, the shareholder suits brought on behalf of a reluctant corporation, *Corbus v. Alaska Treadwell Gold Mining Co.*, 187 U.S. 455, 464 (1903), *cf.*, *Helvering v. Davis*, 301 U.S. 619, 639-40 (1937), or where the tax itself directly operates to place a financial burden upon the taxpayer, *e.g.*, where the valuation of an estate for estate tax purposes would affect the tax liability of a non-taxpayer at a future date, *West Chester Feed & Supply Co. v. Erwin*, 438 F.2d 929 (6th Cir. 1971), when a tax levied upon processing oil would directly affect one about to enter the processing business, *Gardner v. Helvering*, 88 F.2d 746 (D.C. Cir. 1936), *cert denied*, 301 U.S. 684 (1937), *au fond* it is a suit to restrain the collection or assessment of a tax "indirectly" levied upon the plaintiff, and within the purpose and proscription of § 7421(a).

What we have then is a hybird sort of fellow. The challenge upon which we reverse runs not to the exercise of discretion or the everyday working affairs of the Commission, something we feel history and good sense implore us to leave alone, nor is it concerned with taxes levied either directly or "indirectly" upon the corporate appellant, something which § 7421(a) mandates us to leave alone.[17] Finally, an alternate

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[16]Arguably Americans United's purpose could be that of "representing" its remaining contributors who now face the assessment of taxes on their contributed dollars—a sort of "end run" maneuver to avoid the proscriptions of § 7421(a) that we have found to apply to suits brought by those contributors—but we do not believe such to be a realistic appraisal of the situation. Americans United is concerned about its own preservation which is threatened not by the indirect burden of the tax upon them, but by the "unconstitutional" action of the Commissioner resulting in the driving of prospective contributors to other "charities."

[17]Standing to sue and ripeness problems, neither of which we find to preclude the lawsuit before us, could also work to prevent other litigation which arguably would be without the scope of §§ 2201 and 7421(a).

legal remedy in the form of adequate refund litigation is unavailable. The lack of a meaningful alternate form of relief is important herein for two reasons: first, its absence solidifies our belief that the situation *sub judice* is without the purpose and expected scope of § 7421(a), and second, its absence renders equitable relief most appropriate. We suspect that the birthrate of such a hybird will be so low that the proverbial "flood gates" to judicial review of Internal Revenue Service action will remain closed.

4. *Sovereign Immunity*

Appellee, relying chiefly upon *Louisiana v. McAdoo*, 234 U.S. 627 (1914), urges the court to recognize this suit as one against the United States to which consent has not been given, and hence barred by the doctrine of sovereign immunity. We feel that the appellee has failed to recognize this suit as rightly falling within the exceptions to the doctrine as reiterated by the Supreme Court in *Dugan v. Rank*, 372 U.S. 609, 622 (1963). Those exceptions relate to (1) actions by officers beyond their statutory powers, and (2) actions within the scope of their authority, when the powers themselves or the manner in which they are exercised are constitutionally void. The appellants do not challenge the right of the Commissioner to adopt rules and regulations, but they do challenge his right to enforce a statute which they assert violates various constitutional liberties. This clearly falls within the "exception" almost as broad as the "rule," that "sovereign immunity does not prevent a suit against a state or federal officer who is acting either beyond his authority or in violation of the Constitution."[18]

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[18]K. Davis, Administrative Law Treatise 522 (1958). Professor Davis treats Ex Parte Young, 209 U.S. 123 (1908) as the "foundation case" for such a rule:

> If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case

III. SUBSTANTIAL CONSTITUTIONAL QUESTION

The single district court judge below denied appellants' motion to convene a three-judge panel pursuant to 28 U.S.C. § 2282 (1970), for the stated reason that the challenge raised no substantial constitutional questions. We reverse and remand with respect to the only remaining appellant in this litigation, Americans United, with instructions to promptly convene a § 2282 panel.

In *Bulluck v. Washington*, No. 24,862 (D.C. Cir. Jan. 19, 1972), *rehearing en banc*, May 31, 1972, we have recently had an opportunity to restate the scope of a district court's inquiry (and consequently our scope of review) when confronted with an application for a § 2282 panel. The court is limited to questioning (1) whether the constitutional questions raised are substantial, which in turn is limited to a determination of whether they are "obviously without merit" or so clearly unsound by reason of previous decisions of the Supreme Court "as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Ex Parte Poresky*, 290 U.S. 30, 32 (1933); (2) whether the complaint at least formally alleges a basis for equitable relief; and (3) whether the case presented otherwise comes within the requirements of the three-judge panel. *Idlewild Bon Voyage Corp. v. Epstein*, 370 U.S. 713, 715 (1962).

As our discussion of the case to this point has shown, what appellant effectively seeks here is a restraint on the enforcement of the "substantial part" clause of § 501 (c) (3). It accomplishes this by seeking a declaratory judgment that the section is unconstitutional, and by requesting injunctive relief to force the Commissioner to reclassify it and other similarly sit-

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stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.

Id, at 159-160. *See also* Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299, 304-05 (1952).

uated corporations as tax exempt if they are found to qualify. This type of action, affecting legislation of broad regulatory scope and amounting to a restraint on its enforcement as written and interpreted, is within the § 2282 mandate. Satisfied that the other requirements for the three-judge panel are present, and that equitable relief is properly requested, we turn to the substantiality question.

Although as can be seen from our earlier listing[19] appellants originally raised a multitude of possible constitutional violations, at oral argument and in its Reply Brief it has narrowed its focus, and we believe wisely so, to the "discriminatory" aspects of § 501 (c) (3). Basically, this is that since larger, wealthier organizations can engage in conduct identical to that of appellant without, because of their size, falling within the "substantial part" category of § 501 (c) (3) and thereby losing their precious tax exempt status (and more precious listing among those corporations to whom tax free contributions can be made), § 501 (c) (3) is unconstitutionally discriminatory in violation of the equal protection ramifications of the due process clause of the fifth amendment. *See Bolling v. Sharpe*, 347 U.S. 497 (1954).[20] We find such a claim, novel as it may be, neither obviously without merit nor foreclosed by previous Supreme Court decisions.

Appellee relies chiefly upon *Cammarano v. United States*, 358 U.S. 498 (1959), but *Cammarano*, while disposing of appellants' claim that first amendment right are violated by the

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[19]*See* pp. 4-5, *supra*.

[20]It is true that in Helvering v. Lerner Stores Co., 314 U.S. 463, 468 (1941), Justice Douglas wrote that "[a] claim of unreasonable classification or inequality in the incidence or application of a tax raises no question under the Fifth Amendment, which contains no equal protection clause." The great weight of authority today, however, as exemplified by *Bolling*, *Schneider v. Rush*, 377 U.S. 163 (1964), and *Shapiro v. Thompson*, 394 U.S. 618 (1969), is that "[w]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.' " 377 U.S. at 168.

questioned statute, does not attempt to deal with possible discriminatory conduct. In *Cammarano* liquor dealers had expended funds in advertising campaigns against statutory resolutions in Washington and Arkansas which would have effectively closed their businesses, and sought to deduct their costs as ordinary business expenses. The lower courts ruled that "the payments . . . were 'expended for . . . the . . . defeat of legislation' within the meaning of Treas. Reg. 111, § 29.23(0)-1 and were therefore not deductible as ordinary and necessary business expenses under § 23(a) (1) (A) of the Internal Revenue Code of 1939." *Id.* at 501. The court, per Chief Justice Warren, continued:

> Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code. Nondiscriminatory denial of deduction from gross income to sums expended to promote or defeat legislation is plainly not "aimed at the suppression of dangerous ideas."

Id. at 513. Americans United, on the other hand, alleges just that discriminatory conduct found lacking in *Cammarano*. This discrimination relates solely to the "size" of the organization, which appellants allege is directly related to its wealth and power structure, and comes into play during and because of the exercise of first amendment protected liberties. By allowing larger, richer organizations more "dollar punch" in terms of "propagandizing" and "influencing legislation" before their respective activities are considered "substantial," the Commissioner is accused of following the mandate of § 501 (c) (3) and treating identical activity differently, solely on the basis of the size, or wealth, of the acting party.

Nearly every jurist and attorney today is aware of the flood of cases before the bench raising important questions, at least in the context of the fourteenth amendment equal pro-

tection clause, concerning the interpretation of "fundamental rights," "suspect categories," and their resultant "compelling state interest test." A case similar to the redoubtable *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971), which struck down California's system of public school financing as violative of the fourteenth amendment, and straightforwardly classified both "wealth" and "education" as categories calling for stricter justification in terms of equal protection, is presently submitted before the United States Supreme Court. *San Antonio Independent School District v. Rodriguez*, No. 71-1332 (argued 10/12/71, 41 U.S.L.W. 3197). The Court's decision in that case should prove most instructive in an area of concern before us—" "discrimination" of this type as within the "wealth" category, and the status of "wealth" as giving rise to the compelling interest test.

If discrimination exists here it relates to the exercise of the most fundamental of rights, those protected by the first amendment,[21] and raises questions concerning the directness of its relationship to wealth. We are aware that the various tests of which we speak have arisen in the context of the fourteenth amendment, but find that they are nonetheless relevant to the consideration of whether the government has exercised its taxing powers in such a discriminatory fashion as to violate the due process guaranties of the fifth amendment. This is neither

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[21] *See* dissent of Marshall, J., in California v. LaRue, 41 U.S.L.W. 4039, 4048 (December 5, 1972), for discussion of classifications based on speech. *See also* Speiser v. Randall, 357 U.S. 513 (1958), a case which although decided on procedural due process grounds discussed the effect of tax exemptions:

> To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a "privilege" or "bounty," its denial may not infringe speech.

Id. at 518.

a frivolous challenge nor one which, as of the writing of this opinion, has been foreclosed by the Supreme Court.

We want to stress that our opinion is in no way meant to state our views of the merits of this case beyond that required: namely, that the possibility of success is not so certain as to merit the *Enochs* exception with respect to § 7421 (a), yet not so frivolous or foreclosed as to merit denial of the § 2282 motion. The discrimination problem may ultimately prove to be a mirage, or even a muddle, but it certainly is not maggot-pated. The question merits a three-judge panel.

Reversed and remanded for further proceedings consistent with this opinion.

Wilkey, *Circuit Judge*, concurring: I concur unreservedly in Judge Tamm's opinion for the court, all the more willingly because his opinion is a model of lucidity in a field of law — taxation — in which that quality is as rarely found in either judicial decisions or legislation as sunlight on the dark side of the moon.

Since we have decided no issue on the merits, except that the constitutional issues are sufficiently serious to require decision by a three-judge court, I believe it appropriate to raise a question for the consideration of the three-judge court, I believe it appropriate to raise a question for the consideration of the three-judge court which was not briefed by the parties and is not dealt with by our court's opinion.

As I see it, the basis of our decision here is that there is a substantial constitutional question because the challenged tax provision discriminates on the basis of wealth (size), and because the Supreme Court is currently considering cases which may say that such distinctions need to be closely analyzed. Although other statutes are relevant, the vital statute at issue is 26 U.S.C. § 501 (c) (3) (1970), quoted in footnote one of the court's opinion. Making a careful analysis of this statute, the

first part states why tax exemption is granted – and that relates to the *purpose* of the organization. Thereafter are listed several factors which will nullify the tax-exempt status granted by the first part of § 501(c)(3). One of the *dis*qualifications for tax-exempt status is expressed in the phrase, ". . . no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . ."

And this disqualification phrase is what this case is all about. 26 U.S.C. § 501 (c) (3) *first* ties tax status to the *purpose* of the organization–and the "no substantial . . . influence legislation" disqualification test (like the disqualification reference to private earnings or political campaigns) *is aimed at assuring some purity in that purpose.*

It is arguable that a small organization that spends almost all of its funds lobbying is not organized or conducted for the same purpose as a large organization, which may spend quantitatively as much, but which proportionately devotes most of its activities to unquestionably exempt purposes. If we make an analysis by following the impact of the donor's dollar, a gift to "Americans United" has "more punch" on the legislative front than a gift to a large church organization which spends only 1% of its income on lobbying activities.

In that sense, the large organization is not engaged in what can reasonably be called "identical conduct." The statute does not give any greater privilege of speech to large organizations–other than the greater amount of impact any group can have if it raises more money. Rather, the interpretation of equal protection sought by "Americans United" would give a greater right of speech–by emasculating the "purpose" rationale of § 501 (c) (3) – to small organizations. We cannot ignore the "purpose" rationale, because *purpose* is the *only* ground for tax exemption under § 501 (c) (3).

Furthermore, if the larger groups are seen as engaged in "identical conduct"–what is to be the bench mark? If the purpose of the tax statute is to be preserved at all, then the large church organizations probably must hold to devoting a small percentage of their resources to lobbying. Is that *quantitative*

amount then to guide—so that a small organization, with total funds amounting only to the tiny percentage which the large organization devotes to this purpose, could devote 100% of its funds to lobbying and still be exempt?

In short, it is certainly arguable that small groups are not being treated differently by § 501 (c) (3) because they are small, but because they are obviously operating for a different purpose if they devote their comparatively small funds on a much different proportionate basis to propaganda for legislation.

I have raised the issue above by stating only one side of the argument. There are, of course, counterarguments.[1] We are not here deciding this or any other issue on the merits, but since neither party has seen fit to bring this issue to the courts' attention, I feel it of sufficient importance to raise it for such consideration as the three-judge court and parties may wish to give it.

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[1]Some counterarguments may be derived from William G. Halby's article, "Is the Income Tax Unconstitutionally Discriminatory?", 58 A.B.A.J. 1291 (December, 1972). Others may be inspired by the reflection that, if 200 years ago men revolted on the principle that "Taxation without representation is tyranny", then today men may rise in righteous wrath because taxation with representation but beyond human comprehension is even worse.